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Supreme Court, U.S.
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No. 03-1298

IN THE

Supreme Court of the United States

MARGARET WILLIAMS,

Petitioner,

v.

DEVELL R. YOUNG, M.D., P.C. and
DEVELL R. YOUNG, M.D.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF GEORGIA

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Official Code of Georgia Annotated § 9-3-71(a), dealing with medical malpractice statutes of limitation, is unconstitutional as a denial of equal protection and due process guaranteed to petitioner Margaret Williams pursuant to the Fifth and Fourteenth Amendments to the Constitution of the United States and Art. I, Sec. I, ¶¶ 1& 2 of the Constitution of the State of Georgia?

STATEMENT PURSUANT TO RULE 29.6

Respondent, Devell R. Young, M.D., P.C., is a professional corporation, and has no parent corporation and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
Question Presented	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	v
Statement of the Case	1
Clarification of the Record	3
Reasons for Denying the Petition	4
I. Petitioner has failed to carry her burden of establishing that her equal protection and due process claims were raised below.	4
II. Petitioner has failed to carry her burden of establishing that the application of O.C.G.A. § 9-3-71(a) denies her equal protection and due process of the law.	8
A. Petitioner has failed to carry her burden of establishing O.C.G.A. § 9-3-71 treats similarly situated people differently.	8
B. Assuming Petitioner is correct in her argument that O.C.G.A. § 9-3-71 treats similarly situated individuals differently, the statute passes rational basis scrutiny.	10

Contents

Page

C. O.C.G.A. § 9-3-71 is a rational provision which complies with all due process requirements. 12

III. Petitioner has failed to plead any proper jurisdictional basis for this Court to hear state law claims. 14

Conclusion 15

TABLE OF CITED AUTHORITIES

Page

CASES

Adams v. Robertson, 520 U.S. 83 (1997) 4, 5, 6

American Pipe and Const. Co. v. Utah, 414 U.S. 538 (1974) 11

Brown v. New York, 476 U.S. 467 (1986) 11

Bryant v. Crider, 209 Ga. App. 623, 434 S.E.2d 161 (1993) 5, 9

Chase Securities Corp. v. Donaldson, 325 U.S. 304 (1945) 13

Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985) 8, 10, 11

Daughtry v. Cohen, 187 Ga. App. 253, 370 S.E.2d 18 (1988) 9

Department of Agriculture v. Moreno, 413 U.S. 528 (1973) 11

Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987) 5

Ga. Dept. Of Medical Assistance v. Columbia Convalescent Center, 265 Ga. 638, 458 S.E.2d 635 (1995) 12

Cited Authorities

	Page
Heath v. Alabama, 474 U.S. 82 (1985)	5
Illinois v. Gates, 462 U.S. 213 (1983)	5
Jones v. Lamon, 206 Ga. App. 842, 426 S.E.2d 657 (1992)	9
Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982)	13
New York ex rel. Bryant v. Zimmerman, 278 U.S. 63 (1928)	5
Order of Railroad Telegraphers v. Railway Exp. Agency, 321 U.S. 342 (1943)	11
Prune Yard Shopping Center v. Robins, 447 U.S. 74 (1980)	5
Pyler v. Doe, 457 U.S. 202 (1982)	10-11
Romer v. Evans, 517 U.S. 620 (1996)	11
Staples v. Bhatti, 220 Ga. App. 404, 469 S.E 2d 490 (1996)	9
Stone v. Radiology Services, 206 Ga. App. 851, 426 S.E.2d 663 (1992)	9
Street v. New York, 394 U.S. 576 (1969)	5

Cited Authorities

	Page
Surgery Associates v. Kearby, 199 Ga. App. 716, 405 S.E.2d 723 (1991)	9
Taylor v. Illinois, 484 U.S. 400 (1988)	7
Vacco v. Quill, 521 U.S. 793 (1997)	11
Walker v. Melton, 227 Ga. App. 149, 489 S.E.2d 63 (1997)	9
Webb v. Webb, 451 U.S. 493 (1981)	5, 6
Whitaker v. Zirkle, 188 Ga. App. 706, 374 S.E.2d 106 (1988)	9
Yee v. Escondido, 503 U.S. 519 (1992)	4
CONSTITUTIONS	
Ga. Const. Art. I, § 1, ¶ 1	i, 12, 14
Ga. Const. Art. I, § 1, ¶ 2	i, 14
U.S. Const. Amendment XIV	12
STATUTES	
28 U.S.C. § 1257	4, 14
O.C.G.A. § 9-3-71	*passim*

STATEMENT OF THE CASE

Petitioner Margaret Williams (hereinafter "Petitioner") first sought medical treatment from Devell R. Young, M.D. (hereinafter "Respondent Young"), and, through him, by his professional corporation, Respondent Devell R. Young M.D., P.C., on September 29, 1995. (R-5). During this initial visit, Petitioner complained of swelling and tenderness in the left foot and ankle. (R-270; R-5). Petitioner testified below that she informed Respondent Young during a January, 1996 visit that the intensity of the pain in her left ankle and leg increased in December of 1995, at which time the pain became constant. (R- 270-271; R-299).

During the time period between this January, 1996 visit and the Petitioner's final visit to Respondent Young for medical treatment on September 30, 1996, Petitioner made several calls complaining of pain and problems with her left foot. (R - 261-268). She further contends she continually suffered problems with the foot and that she and her co-workers were all trying throughout the period of her treatment with Respondent Young to figure out what was going on with her foot. (R-263; R-267; R - 275-276).

On September 30, 1996, Petitioner visited Respondent Young and sought medical treatment for the final time, complaining of excruciating pain and that her foot was "tilted over to the left." (R-264; R-275). During this visit, Respondent Young reviewed the Petitioner's medications with her and informed Petitioner that he would see her again in January of 1997. (R-275). When Petitioner then asked Respondent Young about her foot, she was told it was a condition that she would have to learn to manage on a daily basis. *Id.* Later that day Petitioner returned to work at the

Health Department, angry, and some of her co-workers suggested she seek treatment from another physician. (R - 275-276). She took this advice, and on the very next day, October 1, 1996, made an appointment to treat with Dr. Daniel Rhoads. (*Id.*). On the first date of treatment with Dr. Rhoads, he diagnosed a dislocation of her talonavicular joint, which he would later attempt to surgically correct on December 10, 1996.

On October 28, 1998, Petitioner filed her complaint alleging medical malpractice against Respondent Young and his practice group. The trial court granted Respondents' motion for summary judgment, finding there existed no genuine issue of material fact as to the running of the statute of limitations in that the competent evidence demonstrated as a matter of law the cause of action arose more than two years prior to the filing of the lawsuit. The Court of Appeals reversed the trial court's entry of summary judgment, adopting for the first time the doctrine of "continuous treatment" in medical malpractice cases involving misdiagnosis — a theory which had previous been expressly rejected by all other tribunals in the state of Georgia.

The Supreme Court of Georgia issued a Writ of Certiorari to the Court of Appeals to review that decision in order to determine whether or not the Court of Appeals correctly adopted the doctrine of "continuous treatment" in medical malpractice cases involving misdiagnosis, and ultimately reversed the Court of Appeals of Georgia's decision. The matter was then remanded to that court for there to be a determination of "when the statute of limitations began to run on [Petitioner]'s misdiagnosis claim and whether she filed her action within two years of that date."

The Georgia Court of Appeals then affirmed the trial court's order awarding summary judgment to Respondents. Petitioner sought a writ of certiorari from the Supreme Court of Georgia, which was granted. The Supreme Court of Georgia was then concerned with the following issue:

> In a medical malpractice action based upon the physician's alleged misdiagnosis of the patient's condition, what is 'the date on which an injury . . . occurred' for purposes of commencement of the two-year statute of limitations established by O.C.G.A. § 9-3-71(a)?

Thereafter the Supreme Court of Georgia decided the writ of certiorari was improvidently granted, and the writ was vacated. Petitioner next filed a motion for reconsideration of that decision, which was denied.

CLARIFICATION OF THE RECORD

To the extent the Petition for Writ of Certiorari implies otherwise, the record makes clear that Petitioner did not incur a new injury after the time of the alleged misdiagnosis, nor is there any evidence of a worsened condition or a condition more difficult to treat. Petitioner suffered all of the symptoms of the dislocation from at least September of 1996 through the time it was diagnosed by Dr. Rhoads and treatment was rendered. There is no evidence that any new injury occurred during or because of the delay. In this matter all that happened subsequent to the alleged misdiagnosis was that Petitioner continued to exhibit exactly the same symptoms for a longer time until she began treating with a new doctor. There is no allegation in the record that Respondent Young caused Petitioner's dislocation of her talonavicular joint.

If Petitioner's allegations of misdiagnosis are true, all Respondent Young caused was Petitioner not obtaining relief from the pain, and that started the minute he incorrectly diagnosed her condition because his treatment did not address the real medical problem afflicting Petitioner, and thus the pain from that problem continued.

REASONS FOR DENYING THE PETITION

The issues raised in the Petition for Writ of Certiorari were never raised or ruled on at any time during the proceedings below. This matter has been briefed before a Georgia trial court, twice before the Court of Appeals of Georgia, and twice before the Supreme Court of Georgia, yet Petitioner has never once raised any claim under the Constitution of the United States or the Constitution of the State of Georgia. Additionally, the Petitioner has failed to include any jurisdictional ground for this Court to consider state law claims, including those claims grounded in the Constitution of the State of Georgia. Further, the application of O.C.G.A. § 9-3-71 to the matter at hand did not deny Petitioner equal protection or due process of the law.

I. Petitioner has failed to carry her burden of establishing that her equal protection and due process claims were raised below.

With "very rare exceptions" *Yee v. Escondido*, 503 U.S. 519 (1992), the Supreme Court of the United States has adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that it will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision it has been asked to review. *Adams v. Robertson*, 520 U.S. 83, 86 (1997);

see also Heath v. Alabama, 474 U.S. 82, 87 (1985); *Illinois v. Gates*, 462 U.S. 213, 217-19 (1983). The petitioners have the burden of showing that the issue was properly presented the courts below. When the highest state court is silent on a federal question, this Court assumes that the issue was not properly presented. *Adams v. Robertson*, 520 U.S. at 86-87; *see also Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987).

This Court has described in different ways how a petitioner may satisfy this requirement. *See Street v. New York*, 394 U.S. 576, 583-85 (1969). Most importantly, this Court has described a petitioner's burden as involving the need to demonstrate that it presented the particular claim at issue here with "fair precision and in due time," *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928); *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 85 (1980). "It would be unseemly in our dual system of government to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider." *Webb v. Webb*, 451 U.S. 493, 500 (1981) (citations and internal quotation marks omitted). Thus the rule affords state courts "an opportunity to consider the constitutionality of the actions of state officials, and, equally important, proposed changes" that could obviate any challenges to state action in federal court. *Gates*, 462 U.S. at 221-22. This traditional standard also reflects "practical considerations" relating this Court's capacity to decide issues. *Bankers Life & Casualty Co.*, 486 U.S. 71, 79 (1988). "Requiring parties to raise issues below not only avoids unnecessary adjudication in this Court by allowing state courts to resolve issues on state law grounds, but also assists us in our deliberations by promoting the creation of an

adequate factual and legal record." *Adams v. Robertson*, 520 U.S. at 90-91 (citing *Webb*, *supra*, at 500).

In the instant matter, the Petitioner cannot carry her burden of showing that her federal equal protection and due process claims were raised below. In an effort to comply with Rule 14 of the Supreme Court of the United States, Petitioner can only direct this Court to the following statement contained in an amicus curiae brief, which was made for the first time during the Georgia Court of Appeals' second review of this matter:

> While the record in this case does not indicate a constitutional challenge to these separate classifications was made, it is clear that this distinction between misdiagnosis cases is not rationally related to any valid legislative purpose because the General Assembly intended that in all medical malpractice cases the statute of limitation commence at the time of injury rather than the negligent act.

Pet. at 6, 52a. Remarkably, this statement affirmatively demonstrates Petitioner's failure to raise any constitutional claims before either the trial court, the Court of Appeals of Georgia during its first review of this matter, or the Supreme Court of Georgia. Moreover, the issue then before the Court of Appeals of Georgia was "when [did] the statute of limitations began to run on Ms. Williams' misdiagnosis claim and whether she filed her action within two years of that date." Pet. at 26a. There was no constitutional issue then before the Court of Appeals of Georgia, nor has there ever been a constitutional issue raised at any time until now, and a general comment made by the Court of Appeals of Georgia in a

footnote indicating its unwillingness to override Georgia's misdiagnosis law does not indicate that it considered and ruled on any issues raised in the amicus brief. Moreover, this Court has held a party may not preserve a constitutional challenge by generally invoking the Constitution in state court and awaiting review in this Court to specify the constitutional provision it is relying upon. *Bankers Life & Casualty Co.* at 77; *cf. Taylor v. Illinois*, 484 U.S. 400, 407 n.9 (1988) ("A generic reference to the Fourteenth Amendment is not sufficient to preserve a Constitutional claim based on an unidentified provision of the Bill of Rights"). Further, the quotation from the amicus curiae brief does not indicate if it is referencing the Constitution of the United States or the Constitution of the State of Georgia. Accordingly, Petitioner has failed to carry her burden of showing that her claims under the Constitution of the United States and the Constitution of the State of Georgia were raised below, and the Petition for Writ of Certiorari should be denied.

Further, the State of Georgia has an undeniable interest in having the opportunity to determine in the first instance whether the statute of limitation satisfies the requirements of due process and equal protection, and whether its legislature should exercise its power to amend the statute to avoid potential constitutional challenges. Here, even if the state court's construction of the statute of limitations would not obviate the due process and equal protection challenge, it would undoubtedly aid this Court's understanding of those rules as a predicate to its assessment of their constitutional adequacy. Further, the parties would have enjoyed the opportunity to test and refine their positions before reaching this Court. Moreover, if this Court were to review O.C.G.A. § 9-3-71 now, it would short-circuit a number of less intrusive, and possibly more appropriate resolutions: the Georgia State Legislature might have chosen to enact legislation amending the statute of limitations;

failing that, the Georgia courts might have chosen to resolve the issue by relying on the State Constitution or on some other adequate and independent non-federal ground; and failing that, the Georgia Supreme Court would have had its opportunity to decide the question of federal law in the first instance, and any ultimate review of the question that this Court might then later undertake would have gained the benefit of a well-developed record and a reasoned opinion on the merits.

II. Petitioner has failed to carry her burden of establishing that the application of O.C.G.A. § 9-3-71(a) denies her equal protection and due process of the law.

A. Petitioner has failed to carry her burden of establishing O.C.G.A. § 9-3-71 treats similarly situated people differently.

The Equal Protection Clause of the Fourteenth Amendment "is essentially a direction that all persons similarly situated should be treated alike.". *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985). The Petitioner's position that all potential plaintiffs in misdiagnosis cases are similarly situated and treated differently under O.C.G.A. § 9-3-71(a) is without merit.

O.C.G.A. § 9-3-71(a) provides that, except in certain circumstances not applicable in the instant action, an action for medical malpractice shall be brought within two years after the date on which an injury or a death arising from a negligent or wrongful act or omission occurred. In cases where the alleged medical negligence is failure to diagnose, or misdiagnosis of a condition, the injury ordinarily begins

immediately upon the misdiagnosis due to the pain, suffering or economic loss sustained by the patient from the time of the misdiagnosis until the medical problem is properly diagnosed and treated. Under established Georgia law the misdiagnosis or failure to diagnose is itself the injury and not the subsequent discovery of the proper diagnosis. *Surgery Associates v. Kearby*, 199 Ga. App. 716, 717, 405 S.E.2d 723 (1991); *Daughtry v. Cohen*, 187 Ga. App. 253, 370 S.E.2d 18 (1988). Further, the fact that the patient does not know the cause of her suffering on account of the misdiagnosis does not affect the running of the statute of limitations if the evidence establishes that the patient's injury occurred and had physically manifested itself to her. *Jones v. Lamon*, 206 Ga. App. 842, 846, 426 S.E.2d 657 (1992); *Bryant v. Crider*, 209 Ga. App. 623, 626-27 (1993); *Stone v. Radiology Services*, 206 Ga. App. 851, 852-52, 426 S.E.2d 663 (1992).

But Georgia courts have carved out a limited exception in misdiagnosis cases when an injury occurs subsequent to the date of misdiagnosis. *Walker v. Melton*, 227 Ga. App. 149, 151, 489 S.E.2d 63 (1997); *Whitaker v. Zirkle*, 188 Ga. App. 706, 708, 374 S.E.2d 106 (1988). Said exception applies only when a misdiagnosis results in a separate and distinct subsequent injury. If there is a subsequent injury as a result of the misdiagnosis, the statute of limitations begins to run on the date the new symptoms attributable to the new injury are manifest to the plaintiff. *See Walker v. Melton, supra* (statute of limitation began to run when the new injuries of destabilization of spine and failure of spinal ligament began to manifest themselves following defendant's failure to diagnosis plaintiff's broken back); *Staples v. Bhatti*, 220 Ga. App. 404, 469 S.E.2d 490 (1996) (Plaintiff sustained new injury when defendant's failure to diagnose breast cancer allowed said cancer to grow into a mass and spread to plaintiff's lymph nodes with the metastasis creating a new injury).

Petitioner incorrectly argues Georgia's statute of limitations in medical malpractice actions treats similarly situated individuals differently. As indicated above, Georgia courts have recognized in misdiagnosis cases there are two different classes of plaintiffs: (1) those who, upon misdiagnosis, immediately experience pain, suffering, and economic loss, and (2) those who do not experience any pain, suffering, and economic loss B that is where no actual injury is present — until a later time. Any argument that these two separate classes of potential plaintiffs are similarly situated is unfounded. The first classification of plaintiffs sustain an injury at the time of misdiagnosis *due to* the pain, suffering and economic loss sustained by the patient from the time of misdiagnosis until a proper diagnosis is made. The second classification of plaintiffs do not sustain an injury at the time of misdiagnosis, but as a result of the misdiagnosis, develop a subsequent injury which triggers the running of the period of limitations. Accordingly, these two groups possess distinguishing characteristics such that the State's acting on the differences between the two does not give rise to a constitutional violation. Moreover, the two classifications are not treated differently as both are provided two years from the date of injury to file their medical malpractice claims.

B. Assuming Petitioner is correct in her argument that O.C.G.A. § 9-3-71 treats similarly situated individuals differently, the statute passes rational basis scrutiny.

As discussed above, the Equal Protection Clause of the Fourteenth Amendment "is essentially a direction that all persons similarly situated should be treated alike." *Cleburne*, *supra*, at 439; *see also Plyler v. Doe*, 457 U.S. 202, 216

(1982). Under the rational basis standard of review, "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Cleburne, supra*, at 440; *see also Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973); *Romer v. Evans*, 517 U.S. 620, 632-33 (1996). Accordingly, under this Court's Equal Protection Clause jurisprudence, Georgia's statute of limitations in medical malpractice actions is presumed to be valid and will be sustained if the classification drawn is rationally related to a legitimate state interest. *Vacco v. Quill*, 521 U.S. 793, 799 (1997).

This Court has a long history of upholding the validity of statutory limitation periods pursuant to the States' interest in eliminating stale claims. As has been consistently explained by this Court:

> Statutes of limitation . . . are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

Brown v. New York, 476 U.S. 467, 482 n.13 (1986); *American Pipe and Const. Co. v. Utah*, 414 U.S. 538 (1974); *Order of Railroad Telegraphers v. Railway Exp. Agency*, 321 U.S. 342, 348-49 (1943).

Petitioner's claim that Georgia's courts have created an unconstitutional distinction between misdiagnosis cases in which the plaintiff develops subsequent injury and misdiagnosis cases in which the injury begins immediately upon the misdiagnosis due to the pain and suffering sustained until a correct diagnosis is made is without merit. The Georgia legislature has chosen the date of injury as the trigger for starting the period of limitations for filing a claim for medical malpractice, and in both classifications discussed above, the statutory period of limitations begins to run when an injury occurs. The fact that Georgia courts have recognized there are exceptional misdiagnosis cases where the injury does not develop until a later time does not deny the Petitioner equal protection of the law. A claim that has not arisen has not been slumbering and is not stale. Accordingly, the classifications created by the application of the statute of limitations are clearly related to the legitimate state interest of preventing stale claims, and the Petition should be denied.

C. O.C.G.A. § 9-3-71 is a rational provision which complies with all due process requirements.

"No person shall be deprived of life, liberty or property except by due process of law." Ga. Const. Art. I, § 1, ¶ 1; *see also* U.S. Const. Amendment XIV. A litigant does have a property interest in her cause of action that she may not be deprived of without due process; however, a State may, consistent with due process, terminate a litigant's claim or appeal for failure to comply with a reasonable procedural rule, such as a statute of limitations. *Ga. Dept. Of Medical Assistance v. Columbia Convalescent Center*, 265 Ga. 638, 639, 458 S.E.2d 635, 637 (1995). Further, this Court has found the States may erect reasonable procedural

requirements for triggering the right to an adjudication, including statutes of limitations. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982); *cf. Chase Securities Corp. v. Donaldson*, 325 U.S 304, 314-16 (1945).

Petitioner has failed to carry her burden of establishing O.C.G.A. § 9-3-71 denies plaintiffs in misdiagnosis cases due process of law without a reasonable basis to do so, and the Petition for Writ of Certiorari should be denied. In fact, Petitioner failed to provide this Court with any authority supporting her claim that the application of the statute of limitations in this case denied her due process. To the contrary, this Court has held that States may erect reasonable procedural requirements concerning adjudication, including statutes of limitations. In Georgia, plaintiffs in medical malpractice misdiagnosis cases are afforded two years from the date of injury to file their claims. Petitioner's argument on this matter consists of her unsupported claim that she was unaware that she had dislocated bones until she received a second opinion. Pet. at 15. However, as detailed above, the Petitioner's symptoms, and thus injury, were clearly present on and before September 30, 1996, the date she last treated with Respondents. She was afforded two years from the date of her misdiagnosis to file her claim and failed to do so. Accordingly, O.C.G.A. § 9-3-71(a) did not deny Petitioner due process, and her Petition should be denied.

III. Petitioner has failed to plead any proper jurisdictional basis for this Court to hear state law claims.

Petitioner's attempt to have this Court consider whether or not O.C.G.A. § 9-3-71(a) violates Art. I, Sec. 1, ¶¶ 1 & 2 of the Constitution of the State of Georgia and other related state law claims is without merit. 28 U.S.C. § 1257 is the primary section governing review by the United States Supreme Court of judgments rendered by the courts of the states. The section permits review by certiorari of final judgment of the highest court of a state that are premised on federal law. As detailed above, the decisions by the Georgia appellate courts at issue in this Petition for Writ of Certiorari were based exclusively on state law claims. There is not a single reference in the decisions of the Georgia appellate courts to any federal law, including the federal equal protection and due process claims which Petitioner now seeks to raise for the first time before this Court. More importantly, 28 U.S.C. § 1257 only permits this Court to review decisions of the highest court of a state which concern federal law. By definition Petitioner's claim that the application of O.C.G.A. § 9-3-71(a) denies her certain rights under the Constitution of the State of Georgia is a state law claim, and 28 U.S.C. § 1257 will not confer jurisdiction upon this Court to entertain such a claim.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied. The issues contained in the Petition for a Writ of Certiorari were never raised at any time during the proceedings below. Further, it is clear that the application of O.C.G.A. § 9-3-71 to the matter at hand did not deny Petitioner equal protection or due process of the law.

Respectfully submitted,

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